Supreme Court, U.S.
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No. 92-444

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK R. FATO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed an appeal by a defendant who fled before sentencing and remained a fugitive during the pendency of his appeal.

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OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeal (Pet. App. 16) and denying reinstatement of petitioner's appeal (Pet. App. 17) are unreported.

JURISDICTION

The order of the court of appeals denying reinstatement of petitioner's appeal was entered on May 18, 1992. A motion for reconsideration was denied on June 16, 1992. The petition for a writ of certiorari was filed on September 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. 371; interstate travel in aid of the commission of arson, in violation of 18 U.S.C. 1952(a)(3); and wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 51 months' imprisonment, to be followed by three years of supervised release, and fined $75,000. Petitioner also was ordered to pay restitution of $210,958.89.

1. Petitioner is the owner and operator of a mobile home business near Buckhannon, West Virginia. In December 1989, he moved from his residence in Glenwood, Maryland, to a new residence in Brookeville, Maryland. Shortly thereafter, petitioner arranged for an employee, Dana Butcher, to burn his former residence, which was insured for $360,000 against fire loss by Hartford Insurance Company. On December 31, 1989, Butcher traveled from West Virginia to Glenwood, Maryland, and set afire petitioner's former residence with diesel fuel and lighter fluid. Two days later, petitioner telephoned his insurance agent in Maryland to initiate a claim for the loss of his former residence. Gov't Version of Offense 1-2 (attached to presentence investigation report).

The state fire marshal ultimately determined that arson was the cause of the fire at petitioner's residence. When petitioner refused to provide a statement under oath, the insurance company denied payment of petitioner's claim in accordance with the terms of the insurance policy. The insurance company, however, paid $210,958.89 to two mortgagees of petitioner's former res-

idence. Gov't Version of Offense 3-4 (attached to presentence investigation report).

2. After being convicted by a jury, petitioner failed to appear for his sentencing on January 6, 1992. His counsel told the district court: "[Petitioner is] not intending to be present today. * * * [I]t is his message to the court that he feels he did not receive justice and a fair trial and felt that he had to leave for those reasons." 1/6/92 Tr. 2. The district court sentenced petitioner *in absentia* and issued a warrant for petitioner's arrest.

3. While petitioner remained a fugitive, his counsel filed a notice of appeal on January 13, 1992. Two weeks later, the court of appeals sent a letter to the parties stating that it was the court's "practice" to dismiss the appeal of an escaped prisoner pursuant to *Estelle* v. *Dorrough*, 420 U.S. 534 (1975). Pet. App. 14-15. The court asked the parties to confirm whether petitioner was still a fugitive. *Id.* at 15. In a letter dated February 3, 1992, the government advised the court that petitioner "has not yet been apprehended and his whereabouts are, at the present, unknown." Three days later, on February 6, the court of appeals dismissed petitioner's appeal with leave to move for reinstatement of the appeal at a future date for good cause shown. Pet. App. 16.

Two and one half months after his appeal was dismissed, petitioner voluntarily surrendered on April 21, 1992. Shortly thereafter, he moved to reinstate his appeal. The court of appeals denied the motion. Pet. App. 17. The court likewise denied petitioner's motion for reconsideration. *Id.* at 18.

ARGUMENT

Petitioner contends that the court of appeals erred by dismissing his appeal and refusing to reinstate it. Pet. 6-12.

1. Petitioner was a fugitive when his appeal was dismissed in this case. It is well settled that appellate courts may dismiss a pending appeal when the defendant is a fugitive. See *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam) (noting that "[d]isposition by dismissal of pending appeals of escaped prisoners is a long-standing and established principle of American law"). Moreover, under this Court's cases, appellate courts are not required to reinstate a dismissed appeal when a fleeing defendant is later recaptured and taken into custody.

In *Allen* v. *Georgia*, 166 U.S. 138, 142 (1897), this Court ruled that, after a fugitive defendant was recaptured, the appellate court was under no obligation to reinstate an appeal that was dismissed while he was at large. Similarly, in *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam), this Court declined to adjudicate the case of a defendant who fled after appealing his state conviction. The Court noted that the escape did not render the appeal moot. Rather, it "disentitle[d] the defendant to call upon the resources of the Court for the determination of his claims." *Id.* at 366. The Court went on to conclude that "[i]n the absence of specific provision to the contrary in the statute under which Molinaro appeals," the Court had inherent authority to dismiss the appeal. *Ibid.* The Court did not make the dismissal of the appeal in *Molinaro* contingent on the defendant's failure to return to custody by a certain date, nor did it indicate that the appeal would be reinstated under those circumstances. Rather, the Court made clear that an appellate court could respond to a defendant's fugitivity

during the pendency of an appeal by an immediate, unconditional dismissal of the appeal with prejudice, without regard to whether the defendant voluntarily returned or was recaptured. See also *United States* v. *Wright*, 902 F.2d 241, 243 (3d Cir. 1990); *United States* v. *Amado*, 754 F.2d 31, 32 (1st Cir. 1985); *United States* v. *Shelton*, 508 F.2d 797, 798-799 (5th Cir.), cert. denied, 423 U.S. 828 (1975). Indeed, the courts of appeals agree that a court may dismiss an appeal even after the defendant is recaptured and returned to custody during the pendency of the appeal. See, *e.g.*, *United States* v. *DeValle*, 894 F.2d 133, 135-136 (5th Cir. 1990); *United States* v. *Puzzanghera*, 820 F.2d 25, 26-27 (1st Cir.), cert. denied, 484 U.S. 900 (1987).

2. Although it is well settled that a court of appeals may dismiss the appeal of a defendant who was at large while his appeal was pending, the courts of appeals are divided on the issue of whether an appeal may be dismissed if a defendant flees and is recaptured and returned to custody before the appeal is filed. The Court recently agreed to resolve that question in *Ortega-Rodriguez* v. *United States*, cert. granted, 112 S. Ct. 2964 (June 15, 1992) (No. 91-7749).* Because the question

* Like this petitioner, the petitioner in *Ortega-Rodriguez* fled before sentencing and was sentenced *in absentia*. Unlike this petitioner, however, the petitioner in *Ortega-Rodriguez* did not file a notice of appeal. When he was later recaptured, the petitioner in *Ortega-Rodriguez* was resentenced, and he then appealed from the second sentence. Thus, the issue in *Ortega-Rodriguez* arises in the context of a defendant who flees and is recaptured before the appeal is filed.

The courts of appeals are divided over whether an appeal may be dismissed in those circumstances. In *United States* v. *Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), the court held that "a defendant who flees after conviction,

presented in *Ortega-Rodriguez* is quite distinct from the issue in this case, it is unlikely that this petitioner would be entitled to any relief even if the petitioner in *Ortega-Rodriguez* were to prevail. Therefore, there is no need for the Court to hold the petition in this case pending its decision in *Ortega-Rodriguez*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992

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but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." See also *United States* v. *Parrish*, 887 F.2d 1107, 1109 (D.C. Cir. 1989); *United States* v. *Persico*, 853 F.2d 134, 136-138 (2d Cir. 1988). In contrast, the First Circuit held in *United States* v. *Anagnos*, 853 F.2d 1, 2 (1988), that it was improper to dismiss the appeal of a recaptured defendant who fled after the conviction but was recaptured before being sentenced and filing an appeal. In *Anagnos*, the court drew a distinction between a defendant who had fled and was recaptured before sentencing and a defendant who fled and was recaptured after he appealed, acknowledging that it had previously ruled that it could dismiss the appeal of a defendant who fled during the pendency of the appeal and was subsequently returned to custody. See *United States* v. *Puzzanghera*, 820 F.2d at 26-27.